903 F.3d 698 (2018)

James OSHER, Plaintiff-Appellant,
v.
CITY OF ST. LOUIS, MISSOURI, Defendant,
Land Clearance for Redevelopment Authority of St. Louis, Defendant-Appellee,
St. Louis Development Corporation, Defendant,
National Geospatial-Intelligence Agency, Defendant-Appellee,
Twenty-Second Judicial Circuit State of Missouri; Otis Williams; Laura Costello, in their official and personal capacities, Defendants.

No. 17-2401.

United States Court of Appeals, Eighth Circuit.

Submitted: June 28, 2018.
Filed: September 6, 2018.

Appeal from United States District Court for the Eastern District of Missouri — St. Louis

Counsel who presented argument on behalf of the appellant was John Andres Thornton, of Miami, FL. The following *700 attorney(s) appeared on the appellant brief; Eric Erfan Vickers, of Saint Louis, MO.

Counsel who presented argument on behalf of the appellee and appeared on the brief of Land Clearance for Redevelopment Authority of St. Louis was Gerard T. Carmody, of Saint Louis, MO. The following attorney(s) appeared on the appellee brief of Land Clearance for Redevelopment Authority of St. Louis; Christopher Powers Kellett, of Saint Louis, MO., Ryann Case Carmody, of Saint Louis, MO.

Counsel who presented argument on behalf of the appellee and appeared on the brief of National Geospatial-Intelligence Agency was Karin A Schute, AUSA, of Saint Louis, MO.

Before COLLOTON, ARNOLD, and SHEPHERD, Circuit Judges.

*699 COLLOTON, Circuit Judge.

James Osher sued the St. Louis Land Clearance for Redevelopment Authority and the National Geospatial-Intelligence Agency after the Redevelopment Authority condemned Osher's property under its power of eminent domain. Osher sought to enjoin the condemnation proceedings and to obtain relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4622. The district court[1] abstained from deciding Osher's claim against the Redevelopment Authority and dismissed his claim against the Agency. We conclude that the Act does not create a private right of action against the Agency, and that Osher waived any challenge to the court's abstention decision, so we affirm.

I.

The district court dismissed this case at the pleading stage, so we take the allegations in Osher's complaint as true. In 2012, the National Geospatial-Intelligence Agency announced its intention to move its western headquarters in St. Louis to a new location. To help persuade this employer to remain in the locale, the City of St. Louis sought to secure an attractive site for the Agency's new headquarters. The City's proposed site in north St. Louis included Osher's property. The St. Louis Land Clearance for Redevelopment Authority began acquiring property within the proposed site. After notifying Osher of its intent to procure his property in December 2015, the

Redevelopment Authority brought a condemnation action in state court.

While the state court action was pending, Osher brought suit in the district court and moved for a temporary restraining order, preliminary injunction, and permanent injunction against the condemnation proceedings. He alleged, among other things, that the Redevelopment Authority and the Agency violated the Uniform Relocation Assistance and Real Property Acquisition Policies Act (the "Act"), 42 U.S.C. § 4622, by failing to pay him the relocation benefits provided by the Act. Osher sought relief under 42 U.S.C. § 1983.

At a hearing on the motion, the district court determined that the parties agreed on the following additional facts. In the state court proceedings, Osher did not challenge the Redevelopment Authority's right to condemn his property, and the Redevelopment Authority took title to the property after paying the property's fair market value of $810,000 plus interest. After Osher refused to vacate the property, *701 the Redevelopment Authority petitioned for a writ of possession from the state court. By the time of the hearing in federal court, the state court had granted the writ of possession and ordered Osher to tender possession of the property to the Redevelopment Authority immediately.

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The district court ultimately denied Osher's motion and dismissed all of his claims. Citing the pending state court condemnation proceedings, the court abstained from exercising jurisdiction over Osher's claim against the Redevelopment Authority under the doctrine of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 756, 760, 27 L.Ed.2d 669 (1971). The court dismissed Osher's claim against the Agency on the grounds that § 1983 does not provide a remedy against a federal agency, and that the Act does not create a private right of action. Alternatively, the court concluded that Osher's claim failed on the merits, because the Act did not apply to the underlying eminent domain proceedings.

II.

Osher noticed an appeal on June 16, 2017, "from the final judgment entered in this matter on May 2, 2017." The Agency agrees that we have appellate jurisdiction, but the Redevelopment Authority argues that the notice was untimely. As timeliness under a statutory deadline is jurisdictional in a civil appeal, *Bowles v. Russell,* 551 U.S. 205, 210-13, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007), we consider the question as to the entire appeal.

Osher had "60 days after entry of the judgment or order appealed" in which to file a notice of appeal. Fed. R. App. P. 4(a)(1)(B); *accord* 28 U.S.C. § 2107(b). The district court's order dismissing the action was filed December 29, 2016, more than 60 days before he filed the notice of appeal on June 16, 2017. But because Osher filed a timely motion for relief from the judgment under Rules 59 and 60, the time to file his appeal did not begin to run until the district court disposed of that motion on May 2, 2017. Fed. R. App. P. 4(a)(4)(A)(iv). Osher filed his notice of appeal within 60 days of May 2, so it is timely.

There is a second reason to be confident that Osher's notice of appeal was timely. "The entry of a judgment triggers the running of the time for appeal," *Jeffries v. United States,* 721 F.3d 1008, 1012 (8th Cir.2013), and "[e]very judgment ... must be set out in a separate document." Fed. R. Civ. P. 58(a). If the separate document requirement is not satisfied, however, "then the order is deemed `entered' 150 days after the dispositive order was entered on the civil docket." *Jeffries,* 721 F.3d at 1012; *see* Fed. R. Civ. P. 58(c)(2). The district court here entered its dismissal order on December 29, 2016, but never set out the judgment in a separate document. The judgment was therefore deemed entered on May 28, 2017. Osher filed his notice of appeal within 60 days of May 28, so his appeal is timely for that reason as well.

On the merits, Osher challenges the district court's dismissal of his claims against the Agency under the Uniform Relocation Assistance and Real Property Acquisition Policies Act. He disputes the district court's conclusion that there is no private right of action under the statute.

The Act provides in relevant part:

> Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the head of the displacing agency shall provide for the payment to the displaced person of —
>
> (1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property; [and]
>
> 702 *702 (3) actual reasonable expenses in searching for a replacement business or farm
>
> . . . .

42 U.S.C. § 4622(a)(1), (3). Osher contends that this provision entitles him to receive relocation benefits and gives him a cause of action to obtain them.

"[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. Univ. of Chi., 441 U.S. 677, 688, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). Section 1983 does not create a remedy against a federal agency, *see* District of Columbia v. Carter, 409 U.S. 418, 424-25, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), so Osher must demonstrate that Congress intended "to create not just a private right but also a private remedy." *Sandoval,* 532 U.S. at 286, 121 S.Ct. 1511. The Act does not expressly create a private right of action; Osher rests on a theory that the Act does so impliedly.

Osher maintains that *Tullock v. State Highway Commission,* 507 F.2d 712 (8th Cir.1974), recognized an implied right of action under the Act. *Tullock* concluded that the Act permitted "judicial review of claims relating to relocation assistance." *Id.* at 715. After determining that the plaintiff was a "displaced person" eligible for relocation benefits, the court stayed eviction proceedings until the district court calculated the plaintiff's recovery under the Act. *Id.* at 717. According to Osher, *Tullock* thus stands for the proposition that the Act provides a private right of action to displaced persons.

Insofar as *Tullock* recognized a private cause of action under the Act, it has been superseded by intervening precedent. *Tullock* was decided in an era when it was deemed "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. *See J.I. Case Co. v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). The Supreme Court, however, "abandoned that understanding in *Cort v. Ash,* 422 U.S. 66, 78 [95 S.Ct. 2080, 45 L.Ed.2d 26] (1975)," decided the year after *Tullock*. *Sandoval,* 532 U.S. at 287, 121 S.Ct. 1511. It is now clear that the proper focus is on congressional intent, and "nothing `short of an unambiguously conferred right'" will support an implied right of action. *Does v. Gillespie,* 867 F.3d 1034, 1040 (8th Cir.2017) (quoting *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002)). It is insufficient to show merely that a particular statute "intend[ed] to benefit the putative plaintiff." *Id.* at 1039 (alteration in original) (quoting *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 509, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990)). *Tullock* never addressed whether the Act unambiguously confers a private right or displays an intent to provide a private remedy.

Examining the relevant indicia of congressional intent, we conclude that Congress did not create a private cause of action to enforce the Act. The Act does not contain "rights-creating" language that is "phrased in terms of the persons benefited." *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268 (quoting *Cannon,* 441 U.S. at 692 n.13, 99 S.Ct. 1946). Rather, the statute "focus[es] on the person regulated rather than the individuals protected," and thus "create[s] `no implication of an intent to confer rights on a particular class of persons.'" *Sandoval,* 532 U.S. at 289, 121 S.Ct. 1511 (quoting *California v. Sierra Club,* 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981)).

703 *703 The operative provision, § 4622(a), commands that "*the head of the displacing agency* shall provide for the payment" of the listed relocation benefits. *Id.* (emphasis added). When certain conditions are present, the Act directs that "*the head of the displacing agency* shall make an additional payment" to qualified displaced persons. *Id.* § 4623(a)(1) (emphasis added); *see also id.* § 4624. And the Act requires that "*[t]he head of any displacing*

agency shall ensure that relocation assistance advisory services ... are made available to all persons displaced by such agency." *Id.* § 4625(b) (emphasis added). Because the Act is phrased as a directive to the regulated agency, the Act lacks "the sort of `rights-creating' language critical to showing the requisite congressional intent to create new rights." Gonzaga, 536 U.S. at 287, 122 S.Ct. 2268.

Congress also provided for an administrative mechanism to enforce compliance with the Act. The existence of administrative procedures "counsel[s] against... finding a congressional intent to create individually enforceable private rights." *Id.* at 290, 122 S.Ct. 2268. The Act instructs the head of the Department of Transportation to "develop, publish, and issue ... such regulations as may be necessary to carry out this chapter." 42 U.S.C. § 4633(a)(1); *see id.* § 4601(12). The Department must include regulations ensuring that "a displaced person who makes proper application ... shall be paid promptly after a move or, in hardship cases, be paid in advance." *Id.* § 4633(b)(2). The regulations further must ensure that "any aggrieved person may have his application reviewed by" the appropriate federal or state official. *Id.* § 4633(b)(3). As required by the Act, the Department's implementing regulations provide an administrative process for displaced persons to apply for relocation benefits, *see* 49 C.F.R. § 24.207, and for federal agencies to enforce compliance by States receiving federal funds. *See id.* § 24.4. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval,* 532 U.S. at 290, 121 S.Ct. 1511.

Osher points to a statement in *Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co. of Virginia,* 464 U.S. 30, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983), that displaced persons are "entitled to relocation benefits" under the Act. *Id.* at 32, 104 S.Ct. 304. But the only issue in *Norfolk* was the meaning of "displaced person." *Id.* at 34, 104 S.Ct. 304 n.5. The Court did not address whether the Act created a private right or remedy, and it is neither binding nor persuasive authority on those questions.

Osher also contends that by stating expressly in § 4602(a) that the provisions of § 4651 "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation," Congress implicitly declared that § 4622 *does* create a private right of action. An express disavowal of rights under one section, however, does not amount to an unambiguous manifestation of intent to create enforceable rights under another. We consider the statute as a whole, and the text and structure of the Act fall short of demonstrating a congressional intent to create a private cause of action under § 4622. The district court properly dismissed Osher's claim against the Agency.

Osher's notice of appeal also encompassed the district court's order abstaining from the exercise of jurisdiction over his claim against the Redevelopment Authority. Osher's notice of appeal stated that he was appealing "from the final judgment entered in this matter on May 2, 2017," and it brought up for review all of the previous rulings

704 and orders that led to the judgment. *See Rosillo v. Holten,* 817 *704 F.3d 595, 597 (8th Cir.2016). In his opening brief, however, Osher did not advance a meaningful argument that the district court erred by abstaining under the *Younger* doctrine. The contention is therefore waived. *White v. Jackson,* 865 F.3d 1064, 1075 (8th Cir.2017). Osher suggested at oral argument that he waived any challenge to abstention only on his claim for injunctive relief, while he adequately disputed the district court's decision to abstain from ruling on his claim for damages. We reject this dichotomy. The brief includes no argument about the abstention ruling in either context, and the point is waived.

* * *

The judgment of the district court is affirmed. The appellees' motions to strike are denied.

[1] The Honorable Henry Edward Autrey, United States District Judge for the Eastern District of Missouri.

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NOTICE
This is a draft decision prepared by one judge.
The draft may be changed, entirely or in part, after argument.

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL BURNS, A SINGLE MAN,
Plaintiff/Appellant,

v.

CITY OF TUCSON, A MUNICIPAL CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2018-0032

Appeal from the Superior Court in Pima County
No. CR20170196
The Honorable Cynthia T. Kuhn, Judge

REVERSED AND REMANDED

COUNSEL

Sammartino Law Group P.L.L.C., Tucson
By Carl Sammartino
Counsel for Plaintiff/Appellant

Jennings, Strouss & Salmon P.L.C., Tucson
By John J. Kastner Jr., Danielle J. K. Constant, and Laura R. Curry

and

Michael J. Rankin, Tucson City Attorney
By Damian Fellows, Principal Assistant City Attorney, Tucson
Counsel for Defendant/Appellee

DRAFT DECISION

¶1 Michael Burns appeals from the trial court's order dismissing his complaint for lack of jurisdiction on the basis that our state's relocation assistance statutes foreclose judicial review. [ROA 16 ep 3] He argues the statutes imply a private right of action, actionable under the original jurisdiction the superior court. [OB ep 13-14] *See* Ariz. Const. art. VI, § 14; A.R.S. §§ 11-961 through 11-974. We agree. Accordingly, we reverse the decision of the trial court and remand for further proceedings.

Factual and Procedural History

¶2 On review of a motion to dismiss, "we assume the truth of all material facts alleged by [the plaintiff]." *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, ¶ 8 (App. 2006). In October 2015, following condemnation of certain property belonging to Burns, an agent for the City of Tucson notified him that he was entitled to receive a total of $38,284.72 in relocation-assistance benefits. *See* A.R.S. § 11-963. [ROA 8 ep 22 ($7311.72 in storage costs), 27 ($30,973 in moving costs)] In December, Burns filed an appeal with that agent claiming he was entitled to a larger benefit. [See next] The agent affirmed the assistance award a month later. [ROA 8 ep 37 (appeal 12/10/15), 32 (affirm #1 1/12/16), 33 (#2)] In July 2016, Burns served a notice of claim on the City and, in January 2017, brought suit, alleging

negligence, a claim under the relocation-assistance statutes, and that the City had denied him due process. [ROA 5 ep 3-4, ROA 8 ep 4:6-17]

¶3 The City filed a motion to dismiss asserting the superior court lacked subject matter jurisdiction because the relocation-assistance statutes do not provide for judicial review.[1] [ROA 8 ep] Following a hearing, the trial court determined neither the relocation-assistance statutes nor the Administrative Review Act authorized judicial review and dismissed Burns's complaint with prejudice. *See* A.R.S. § 12-902(A). [MDH ep 3:3-6; ROA 16 (UAR ep 3); ROA 18 (Jdgt – 12/12/17)] Burns appealed; we have jurisdiction. A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1). [ROA 20 (1/4/18 – 23 days))]

Implied Right of Action

¶4 Burns argues our relocation-assistance statutes imply a private right of action in favor of displaced persons aggrieved by the amount of relocation assistance benefits an acquiring agency offers. [OB ep 24] Whether a statute implies a private right of action is a question of law

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[1]The City also argued below that the trial court lacked jurisdiction under the Administrative Review Act (ARA) because Burns had not timely appealed thereunder. *See* A.R.S. § 12-904(A). [ROA 12 ep 6:6-23] However, the court correctly determined the ARA did not apply because it specifically excludes municipal corporations. *See* A.R.S. § 12-901(1); *Stant v. City of Maricopa Emp. Merit Bd.*, 234 Ariz. 196, ¶ 10 (App. 2014); *see also Coombs v. Maricopa Cty. Special Health Care Dist.*, 241 Ariz. 320, ¶¶ 6-9 (App. 2016). [ROA 16 ep 3] On appeal, the City agrees the ARA does not govern this action. [AB ep 13]

we review de novo. *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, ¶ 8 (App. 2017).

¶5 In relevant part, our relocation-assistance statutes require a "displacing agency, as a part of the cost of the project, [to] make a payment to a displaced person . . . for . . . [a]ctual reasonable expenses in moving himself and his family, business, . . . or other personal property." A.R.S. § 11-963(A)(1). Further, these benefits shall not "be construed as creating in any condemnation proceedings brought under the power of eminent domain any element of damages not [previously] in existence." A.R.S. § 11-970. Finally, "[a]ny displaced person aggrieved by . . . the amount of a payment[] may have his application reviewed by the chief executive officer of the acquiring agency whose decision shall be final." A.R.S. § 11-967.

¶6 In determining whether this language implies a private right of action or forecloses judicial review, we begin by recognizing that, unlike federal rules that generally prohibit an implied right of action, Arizona law "more broadly implies such a right when consistent with 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.'"[2] *Chavez v. Brewer*,

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[2]A few Arizona cases concern claims brought under the relocation-assistance statutes; they do not, however, address whether the statutes imply a private right of action. *See, e.g.*, *Owens v. City of Phoenix*, 180 Ariz. 402 (App. 1994); *Morgan v. City of Phoenix*, 162 Ariz. 581, 586-87 (App. 1989).

222 Ariz. 309, ¶ 24 (App. 2009) (quoting *Transamerica Fin. Corp. v. Superior Court*, 158 Ariz. 115, 116 (1988)).

¶7 In making the inquiry, courts have focused not only on the statue itself, but particularly on whether the statutory benefit "only inures to the benefit" of the plaintiff; that is, whether he or she is the intended beneficiary. *Transamerica Fin. Corp.*, 158 Ariz. at 117. In *Chavez*, this court determined that Arizona statutes requiring the secretary of state to certify all voting machines under certain federal standards created a private right of action. 222 Ariz. 309, ¶¶ 2-3, 28. There, we reasoned that because the legislature had enacted the statutes to "clearly benefit individuals with disabilities," and the plaintiffs had been members of "'the class for whose especial benefit' the statutes were adopted," there was "an implied right to maintain their statutorily based claims for relief." *Id.* ¶ 28 (quoting *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 457 (App. 1984)). Likewise, in *Douglas v. Governing Board of Window Rock Consolidated School District No. 8*, this court determined a statute authorizing an increase in school-district funding, but limiting those funds exclusively to "additional teacher compensation" implied a private right of action for teachers to compel their employer-school district to so spend such funds. 206 Ariz. 344, ¶¶ 1-4, 8 (App. 2003) (quoting A.R.S. § 15-952(C)).

¶8 By contrast, our courts have determined no implied right of action existed when the relief sought is incidental to or exceeds the right provided. In *Gersten*, we determined a provision of Arizona's Medical Marijuana Act (AMMA) specifying that "authorized use of marijuana . . . does not . . . otherwise disqualify a registered qualifying patient from medical care" did not imply a right of action to a patient discharged from his doctor's care. 242 Ariz. 301, ¶¶ 1, 3 (quoting A.R.S. § 36-2813(C)). There, the patient sought both damages and to compel a doctor to continue treating him "in the same manner, at the same rate, and at the same standard of care." *Id.* ¶ 3. Rejecting his claim, the court reasoned § 36-2813(C) "does not require a physician to treat a qualifying patient, nor does [its] wording attempt to regulate the relationship between a physician and patient," as do other provisions of the AMMA regulating schools, landlords, and employers. *Id.* ¶ 12-13 (citing A.R.S. § 36-2813(A), (B)).

¶9 Similarly, in *Guibault v. Pima County*, we determined that although the Arizona Health Care Cost Containment System, *see* A.R.S. §§ 36-2901 through 36-2930.06, provided a right to certain medical benefits, "[n]othing in the statutes evidences an intent to create or permit a separate cause of action for damages proximately caused by . . . a wrongful denial of benefits." 161 Ariz. 446, 450 (App. 1989). We reasoned that "when the state creates rights against itself that were unknown at common law, it is free to

define not only the extent of the obligation undertaken but also the remedy . . . for its enforcement." *Id.* Accordingly, we concluded that the legislature created only a right to medical care and payment therefor, but no more. *Id.* ("[W]hen an indigent is denied eligibility for such care, his or her only remedy is to recover payment for benefits wrongfully denied."); *see also* *Lancaster*, 143 Ariz. at 454-55, 457 (statute requiring university regents to report to legislature on wage equivalency did not imply right of action to equal pay).

¶10 In considering the effects and consequences of whether to imply such a right, our courts also examine whether an aggrieved party might otherwise find meaningful relief. *See* *Douglas*, 206 Ariz. 344, ¶ 9; *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974) (regarding Consumer Fraud Act: "Without effective private remedies the widespread economic losses that result from deceptive trade practices remain uncompensable and a private remedy is highly desirable in order to control fraud in the marketplace."). In *Douglas*, the court rejected a school district's argument that because teachers were not entitled to a specific amount or type of compensation, the statute could not imply a private right of action. 206 Ariz. 344, ¶ 9. The court nevertheless reasoned that apart from an implied right of action, there would be "no way of holding the school districts accountable for the misappropriation of these funds." *Id.*;

see also Napier v. Bertram, 191 Ariz. 238, ¶¶ 12-13 (1998) (implied right of action "best and perhaps only effective way" to ensure cab owners obtain insurance in compliance with statute).

¶11 Citing *Napier* and *Douglas*, the City characterizes the inquiry into other avenues of relief as turning on "the unavailability of any remedy, rather than the sufficiency of [that] remedy." [AB ep 27] Accordingly, the City argues that "Burns' quarrel is with the alleged insufficiency" of review by the City's chief executive. [AB ep 27] But summary review by the senior-most official of the very organization that made the initial determination hardly provides a level of oversight that would ensure compliance with the statute. *See* § 11-967. We cannot say such remedy is sufficient to foreclose a right of action. *Cf. Napier*, 191 Ariz. 238, ¶ 12 (misdemeanor criminal sanctions for violation insufficient, by themselves, to fulfill statutory purpose).

¶12 Regarding a statute's language, our cases demonstrate that the availability of an administrative remedy does not foreclose the possibility of an implied right of action. *See Transamerica Fin. Corp.*, 158 Ariz. at 117 (in addition to express, administrative right of action in Consumer Loan Act, legislature contemplated private right of action to void usurious contract). In *Sparks v. Republic National Life Insurance Co.*, our supreme court determined the Arizona Insurance Code "contemplates a

private suit to impose civil liability irrespective of governmental action against [an] insurer." 132 Ariz. 529, 540-41 (1982) (discussing availability of administrative remedies including cease-and-desist orders and civil penalties, among others). By contrast, we have determined no private right of action exists when a statute expressly provides an exclusive administrative remedy. *See Leal v. Allstate Ins. Co.*, 199 Ariz. 250, ¶ 28 (App. 2000) (discussing A.R.S. § 20-461(D) ("Nothing contained in this section is intended to provide any private right or cause of action," but rather, "to provide solely an administrative remedy to the director [of the Department of Insurance].")); *see also* A.R.S. § 17-255.04(C) (game and fish statutes concerning aquatic invasive species "do[] not create any express or implied private right of action and may be enforced only by this state").

¶13 Here, our relocation-assistance statutes require a "displacing agency . . . [to] make a payment to a displaced person . . . for . . . [a]ctual reasonable expenses." § 11-963(A)(1). As the City concedes, it is the displacing agency and Burns is a displaced person. *See* A.R.S. § 11-961(1), (4). [ROA 5 ep 2, ¶¶ 9-13; ROA 7 ep 2-3, ¶¶ 9-13] Accordingly, Burns is a member of the class for whose benefit the statutes were adopted, *see Chavez*, 222 Ariz. 309, ¶ 28, and to whom its benefits inure. *See Transamerica Fin. Corp.*, 158 Ariz. at 117. Additionally, Burns has not sought damages of a different sort than or in addition to what the statute provides. *See Guibault*,

161 Ariz. at 450. Also, because the statute provides no means of enforcing the requirement independent of the displacing agency, there would be no way to hold acquiring agencies accountable if they fail to appropriately compensate displaced persons. *See* § 11-967; *Douglas*, 206 Ariz. 344, ¶ 9. Finally, the language of the statutory scheme does not expressly exclude a private right of action. *See Transamerica Fin. Corp.*, 158 Ariz. at 117.

¶14 The City argues the statutes preclude judicial review by providing that an aggrieved person "may have his application reviewed by the chief executive officer of the acquiring agency whose decision shall be final." § 11-967. [AB ep 19] Arguing relocation-assistance statutes are "entirely a creature of legislative grace," the City insists this language is "strong . . . evidence that the legislature did not intend to create any additional private right of action." [AB ep 19] But this language of finality is not so unequivocal. Rather, it is also susceptible to the interpretation that once the chief executive officer has issued a decision, no further agency process remains; i.e. such procedures have been exhausted and the controversy is ripe for judicial review. *See Burnkrant v. Saggau*, 12 Ariz. App. 310, 312 (1970) ("[A]s a general rule, a person must exhaust administrative remedies before seeking relief in court.").

¶15 The City further insists that because the relocation-assistance statutes provide that they do not create "in any condemnation proceedings

brought under the power of eminent domain any element of damages not [previously] in existence," § 11-970, the legislature vested the acquiring agency not only with the power to make relocation determinations but also the sole authority to review them. [AB ep 20] But Burns did not assert his claim for damages during proceedings "brought under the power of eminent domain." *Id.* Indeed, this very language belies the City's contention; the better interpretation of § 11-970 is that relocation expenses are a separate matter unrelated to valuing just compensation for condemned property. And as the parties agree, the City had already lawfully condemned the subject property. [ROA 5 ep 2, ¶ 9; ROA 7 ep 2, ¶ 9] Although the instant litigation may be related to those proceedings, Burns did not assert his claim for damages within them.

¶16 The City additionally reasons § 11-970 bars judicial review because "the agency actually condemning the property is equipped to analyze such relocation issues, while the superior court does not have the same experience or knowledge regarding project construction, budgeting, or relocations considerations." [AB ep 20] But our courts routinely rely on and weigh the expertise of other disciplines, and the City offers no reason why this particular subject area would be any different. *See, e.g.*, Ariz. R. Evid. 702, 703.

¶17 Relying on A.R.S. §§ 11-962, 11-963, and 11-970, the City asserts that a private right of action would undermine the statutes' purpose to streamline government undertakings by "potentially impact[ing] project budgets in unknowable ways years after the final agency determination." [AB ep 20-21] But a private right of action would not so undermine the statutes' purposes. Rather, the statutes aim for tandem purposes: "minimiz[ing] adverse impacts on displaced persons and . . . expedit[ing] program or project advancement and completion." Even assuming the City's interpretation that expedited legal process is in view, we decline its invitation to prioritize this concern at the expense of minimizing adverse impacts on displaced persons. Further, the City does not explain how litigation over actual relocation expenses after real property has been condemned would delay project advancement or completion, activities that may proceed independent of each other. Rather, the better interpretation is that the statute aims to expedite relocation of displaced persons and their personal property so that no physical impediment would delay project advancement and completion. *See* § 11-962(A)(2). And, as we stated above, the City takes too broad a view of § 11-970, which is limited to eminent domain proceedings, rather than municipal projects globally.

¶18 Because the relocation assistance statutes reference corresponding federal regulations, *see* A.R.S. § 11-968 (citing 49 C.F.R.

§§ 24.201 through 24.503), the City invites us to adopt the determinations of certain federal courts that find no implied, private right of action in federal-relocation-assistance statutes. [AB ep 22] *See, e.g.*, *Delancey v. City of Austin*, 570 F.3d 590, 594-95 (5th Cir. 2009). But federal courts considering this question in the context of federal statutes have applied a standard for implied rights of action that our supreme court has expressly rejected, *see* *Transamerica Fin. Corp.*, 158 Ariz. at 117 n.1, and we are not at liberty to disregard the dictates of our highest court. *See* *Craven v. Huppenthal*, 236 Ariz. 217, ¶ 13 (App. 2014). [AB ep 22]

¶19 Finally, the City urges that our cases finding a private right of action are distinguishable because "[t]he statutory schemes in those cases are refinements, enshrinements and perhaps even arguably expansions of pre-existing common law rights," whereas the relocation-assistance statutes "create[] a right . . . where none would otherwise exist." *See* *Sparks*, 132 Ariz. at 541; *Sellinger*, 110 Ariz. at 576. [AB ep 23-24] But the rationale of the cases finding a private right of action do not limit themselves in this manner, and the City does not provide a compelling reason for such a bright-line rule. *See* *Chavez*, 222 Ariz. 309, ¶¶ 22-28 (no mention of common law); *Guibault*, 161 Ariz. at 450 (acknowledging remedy for right created by state against itself that did not exist at common law, but excluding remedy for damages proximately caused by wrongful denial of right).

¶20 Having considered all the above factors, we determine that the legislature implied a private right of action in the relocation-assistance statutes, enabling a displaced person to enforce his rights to such benefits. Accordingly, the superior court has original jurisdiction over Burns's claim under our state's constitution.[3] *See* Ariz. Const. art. VI, § 14.

Negligence

¶21 Burns also urges that he is entitled to maintain a common-law claim for negligence against the City. [OB ep 2] However, the trial court did not reach the merits of this issue, and we decline to do so in the first instance. *See Stewart v. Mut. of Omaha Ins. Co.*, 169 Ariz. 99, 108 (App. 1991).

Disposition

¶22 Because our relocation-assistance statutes imply a private right of action, we reverse the decision of the trial court dismissing Burns's complaint and remand for further proceedings consistent with this decision.

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[3]Because we determine the superior court has original jurisdiction over Burns's claim, we need not address whether, as Burns asserts in the alternative, that the court should have exercised special-action jurisdiction. [ROA 16 ep 3-4; OB ep 3; AB ep 32]

IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL BURNS, A SINGLE MAN,
Plaintiff/Appellant,

v.

CITY OF TUCSON, A MUNICIPAL CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2018-0032
Filed November 23, 2018

Appeal from the Superior Court in Pima County
No. CR20170196
The Honorable Cynthia T. Kuhn, Judge

AFFIRMED

COUNSEL

Sammartino Law Group P.L.L.C., Tucson
By Carl Sammartino
Counsel for Plaintiff/Appellant

Jennings, Strouss & Salmon P.L.C., Tucson
By John J. Kastner Jr., Danielle J. K. Constant, and Laura R. Curry

and

Michael J. Rankin, Tucson City Attorney
By Damian Fellows, Principal Assistant City Attorney, Tucson
Counsel for Defendant/Appellee

OPINION

Chief Judge Eckerstrom authored the opinion of the Court, in which Presiding Judge Staring concurred and Judge Brearcliffe specially concurred.

E C K E R S T R O M, Chief Judge:

¶1 Michael Burns appeals from the trial court's order dismissing his complaint that alleged violations of his rights under Arizona's relocation-assistance statutes. He argues those statutes imply a private right of action, that he was entitled to bring a negligence action to remedy his inadequate relocation-assistance award, and that the superior court should have exercised special-action jurisdiction. We affirm.

Factual and Procedural History

¶2 On review of a motion to dismiss, "we assume the truth of all material facts alleged by [the plaintiff]." *Phelps Dodge Corp. v. El Paso Corp.*, 213 Ariz. 400, ¶ 8 (App. 2006). In October 2015, following condemnation of certain property belonging to Burns, an agent for the City of Tucson notified him that he was entitled to receive a total of $38,284.72 in relocation-assistance benefits. *See* A.R.S. § 11-963. In December, Burns filed an appeal with that agent claiming he was entitled to a larger benefit. The agent, with the concurrence of the Project Manager of the City's Real Estate program, affirmed the assistance award a month later. In July 2016, Burns served a notice of claim on the City and, in January 2017, brought suit, alleging negligence, a claim under the relocation-assistance statutes, and that the City had denied him due process.

¶3 The City filed a motion to dismiss asserting the superior court lacked subject matter jurisdiction because the relocation-assistance statutes do not provide for judicial review.[1] Following a hearing, the trial court

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[1]The City also argued below that the trial court lacked jurisdiction under the Administrative Review Act (ARA) because Burns had not timely appealed thereunder. *See* A.R.S. § 12-904(A). However, the court correctly determined the ARA did not apply because it specifically excludes municipal corporations. *See* A.R.S. § 12-901(1); *Stant v. City of Maricopa Emp.*

determined neither the relocation-assistance statutes nor the Administrative Review Act authorized judicial review and dismissed Burns's complaint with prejudice. *See* A.R.S. § 12-902(A). The court further declined to treat the complaint as a petition for special action. Burns appealed; we have jurisdiction. A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Implied Right of Action

¶4 Burns argues our relocation-assistance statutes, *see* A.R.S. §§ 11-961 to 11-974, imply a private right of action in favor of displaced persons aggrieved by the amount of relocation-assistance benefits an acquiring agency offers. Whether a statute implies a private right of action is a question of law we review de novo. *Gersten v. Sun Pain Mgmt., P.L.L.C.*, 242 Ariz. 301, ¶ 8 (App. 2017).

¶5 In relevant part, our relocation-assistance statutes require a "displacing agency, as a part of the cost of the project, [to] make a payment to a displaced person . . . for . . . [a]ctual reasonable expenses in moving himself and his family, business, . . . or other personal property." A.R.S. § 11-963(A)(1). Further, the statute provides that a "displaced person aggrieved by . . . the amount of a payment, may have his application reviewed by the chief executive officer of the acquiring agency whose decision shall be final." A.R.S. § 11-967.

¶6 In determining whether the relocation-assistance statutes provide a private right of action, we begin with the statutory language, which is "the best and most reliable index of its meaning." *Arpaio v. Steinle*, 201 Ariz. 353, ¶ 5 (App. 2001). "[W]hen the statute is plain and unambiguous, we will not engage in any other method of statutory interpretation." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 13 (App. 2008). However, in the absence of express language, Arizona law more broadly implies a private right of action "when consistent with 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.'"[2] *Chavez v. Merit Bd.*, 234 Ariz. 196, ¶ 10 (App. 2014); *see also Coombs v. Maricopa Cty. Special Health Care Dist.*, 241 Ariz. 320, ¶¶ 6-9 (App. 2016).

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[2] A few Arizona cases concern claims brought under the relocation-assistance statutes; they do not, however, address whether the statutes imply a private right of action. *See, e.g.*, *Owens v. City of Phoenix*, 180 Ariz. 402 (App. 1994); *Morgan v. City of Phoenix*, 162 Ariz. 581, 586-87 (App. 1989).

Brewer, 222 Ariz. 309, ¶ 24 (App. 2009) (quoting *Transamerica Fin. Corp. v. Superior Court*, 158 Ariz. 115, 116 (1988)).

¶7 Here, the statute neither expressly confers nor forecloses a private right of action. Accordingly, we must consider not only the statutory language, but also its context, subject matter, effects and consequences, and spirit and purpose. *See Chavez*, 222 Ariz. 309, ¶ 24.

¶8 With respect to its language, the statute provides for review "by the chief executive officer of the acquiring agency whose decision shall be final." § 11-967. This language of finality strongly indicates the legislature intended to limit review to the chief executive officer. *Id.* A private right of action would guarantee a third tier of review, rendering that decision other than final. Burns has not cited, and we are not aware of, any case in which our courts have found an implied right of action in the presence of language providing a level of review and expressing that the decision on review is final.

¶9 Nevertheless, Burns makes the non-trivial argument that the spirit and purpose of the relocation-assistance statutes support finding an implied right of action. *See Chavez*, 222 Ariz. 309, ¶ 24. In particular, he observes that relocation-assistance payments only inure to the benefit of displaced persons, of which Burns is one. *See id.* ¶ 28 (citing *Transamerica Fin. Corp.*, 158 Ariz. at 117). He correctly maintains that we have generally found this to be a strong factor suggesting a legislative intent to provide a private right of action. *Id.*; *Transamerica Fin. Corp.*, 158 Ariz. at 117.

¶10 And, it is debatable whether a displaced person might find meaningful relief apart from an implied right of action considering that § 11-967 merely provides summary review by the senior-most official in the very organization making the initial determination. *See Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, ¶ 9 (App. 2003) (no way of holding school districts accountable for misappropriation of funds apart from implied right of action); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974) (implied right of action "highly desirable in order to control fraud in the marketplace").

¶11 Notwithstanding the less than independent or robust review provided in § 11-967, the legislature is free to establish such a scheme when, as in this circumstance, it creates a wholly new right against itself. *See Guibault v. Pima County*, 161 Ariz. 446, 450 (App. 1989) (state free to define obligation and remedy "if any" when it creates rights against itself unknown at common law). Moreover, judicial review is not utterly

foreclosed inasmuch as an aggrieved person may seek a writ of certiorari in the superior court in a special-action proceeding. *See* A.R.S. § 12-2001; Ariz. R. P. Spec. Act. 1.

¶12 Given that § 11-967 both provides an administrative review process and suggests that the process is final, we conclude that the legislature contemplated no private right of action in enacting that statute. Accordingly, the trial court did not err by dismissing Burns's complaint for failure to state a claim upon which relief could be granted.

Negligence

¶13 Burns also urges that he is entitled to maintain a common-law claim for negligence against the City. However, the trial court did not reach the merits of this issue. Nevertheless, we address whether Burns may maintain an action for negligence under our relocation-assistance statutes because the question is purely one of law. *See Liristis v. Am. Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11 (App. 2002) ("If application of a legal principle . . . would dispose of an action on appeal and correctly explain the law, it is appropriate for us to consider the issue." (quoting *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993))).

¶14 Arguing from Arizona's general rule that a plaintiff can pursue common-law damages against governmental entities, *see Pritchard v. State*, 163 Ariz. 427, 431 (1990), Burns insists that nothing in the relocation-assistance statutes "clearly and unambiguously demonstrates the legislature intended to divest the superior court of general jurisdiction to hear Burns'[s] negligence claim against the City." Accordingly, he asserts the City breached its statutorily created duty to provide full relocation benefits. But in reaffirming the principle that governmental immunity is the exception in Arizona rather than the rule, *Pritchard* recognized that our supreme court invited the legislature to intervene and develop the boundaries of sovereign immunity. *Id.* Accepting that invitation, the legislature enacted the Actions Against Public Entities or Public Employees Act, *see Glazer v. State*, 237 Ariz. 160, ¶¶ 10-11 (2015), which limits actionable injuries to those a "person may suffer . . . if inflicted by a private person." A.R.S. § 12-820(2).

¶15 Here, the relocation-assistance statutes impose no duty upon any private person, and we decline to extend the statutory language or otherwise restrict sovereign immunity beyond the limits set forth by our legislature and recognized by our supreme court. *See* § 12-802(2); *Pritchard*, 163 Ariz. at 431 ("the state and its agents will be subject to the same tort law

as private citizens" (quoting *Ryan v. State*, 134 Ariz. 308, 311 (1982))). Thus, Burns cannot maintain a claim for negligence with respect to the relocation-assistance statutes, and the trial court properly dismissed his complaint as to this count.

Special-Action Jurisdiction

¶16 Finally, Burns argues that if the statutes do not imply a right of action and a petition for special action is his only avenue for relief, we "should require the [trial] court to hear [his] argument for such relief." We review a trial court's decision to decline special-action review for an abuse of discretion. *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (App. 1979).

¶17 When a party does not state facts sufficient to justify special-action relief, the trial court has the discretion to decline jurisdiction. *See Coombs v. Maricopa Cty. Spec. Health Care Dist.*, 241 Ariz. 320, ¶ 10 (App. 2016). Here, the trial court noted that Burns neither alleged facts sufficient to show the City had acted illegally, arbitrarily, or capriciously, *see* Ariz. R. P. Spec. Act. 3(c), nor did he request leave to amend his complaint to do so. Accordingly, the court determined it would not *sua sponte* treat his complaint as a petition for special action. We cannot say the court abused its discretion. *See Coombs*, 241 Ariz. 320, ¶ 10.

Disposition

¶18 For the foregoing reasons, we affirm.

B R E A R C L I F F E, Judge, specially concurring:

¶19 I concur in the result and the relevant reasoning that reached it. I write separately only to state that, in my view, it is unnecessary to engage in the private-right-of-action analysis—as the opinion does in paragraphs 7-10 above—when a statute, like this one, expressly confers a right of review. Such an analysis is ill-suited to such a statute. It is akin to engaging in a balancing test where a law creates a bright-line rule: you can do it, but it is unnecessary and may lead to the wrong conclusion.

FILED BY CLERK
NOV 27 2018
COURT OF APPEALS
DIVISION TWO

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

O R D E R

2 CA-CV 2018-0032
Department A
Pima County
Cause No. C20170196

RE: MICHAEL BURNS v. CITY OF TUCSON

On the court's own motion,

ORDERED: The clerk shall correct this court's Opinion filed November 23, 2018, by deleting paragraphs 7 and 8 and inserting:

¶7 Here, the statute neither expressly confers nor forecloses a private right of action. Accordingly, we must consider not only the statutory language, but also its context, subject matter, effects and consequences, and spirit and purpose. *See Chavez*, 222 Ariz. 309, ¶ 24.

¶8 With respect to its language, the statute provides for review "by the chief executive officer of the acquiring agency whose decision shall be final." § 11-967. This language of finality strongly indicates the legislature intended to limit review to the chief executive officer. *Id.* A private right of action would guarantee a third tier of review, rendering that decision other than final. Burns has not cited, and we are not aware of, any case in which our courts have found an implied right of action in the presence of language providing a level of review and expressing that the decision on review is final.

The opinion in all other respects remains unchanged.

DATED: November 27, 2018

____
Jeffrey P. Handler
Clerk of the Court

2 CA-CV 2018-0032
Pima County Superior Court Number C20170196

Copies to:

Carl R. Sammartino
Sammartino Law Group, P.L.L.C.
5240 E. Pima St.
Suite 113
Tucson, AZ 85712

John J. Kastner
KIMBLE, NELSON, AUDILETT & KASTNER, P.C.
335 N. Wilmot, Suite 500
Tucson, AZ 85711-2636

Danielle J. K. Constant
Jennings, Strouss & Salmon, PLC
1760 E. River Road, Ste. 230
Tucson, AZ 85718-5990

Laura Curry
Jennings, Strouss & Salmon, PLC
One East Washington, Suite 1900
Phoenix, AZ 85004

Christopher W. Kramer
Jennings, Strouss & Salmon, PLC
1760 East River Road, Suite 230
Tucson, AZ 85718-5990

Damian M. Fellows
Principal Assistant City Attorney
TUCSON CITY ATTORNEY'S OFFICE, Civil Div.
255 W. Alameda
Tucson, AZ 85701

Hon. Cynthia T. Kuhn, Judge
Pima County Superior Court
110 W. Congress Street
Tucson, AZ 85701

Toni L. Hellon
Clerk of the Court
Pima County Superior Court
110 W. Congress
Tucson, AZ 85701

Andy Dowdle
Research & Statistics
Pima County Superior Court
110 W. Congress
Tucson, AZ 85701